

IN THE HIGH COURT OF SOUTH AFRICA
(FREE STATE PROVINCIAL DIVISION)

Case No.: 603/2007

In the matter between:-

MARTHIE JOHANNA RETIEF 1st Applicant

CORNELIS JANSE RETIEF 2nd Applicant

and

ELIZABETH ANNA WESSELS 1st Respondent

ELIZABETH ANNA WESSELS N.O. 2nd Respondent
(In her capacity as Trustee of the
ELIZABETH ANNA RETIEF DE JAGER
TRUST NO: IT 9738/97)

ELIZABETH ANNA DU TOIT N.O. 3rd Respondent
(In her capacity as Trustee of the
ELIZABETH ANNA RETIEF DE JAGER
TRUST NO: IT 9738/97)

ELIZABETH ANNA DU TOIT 4th Respondent

BETSIE DU TOIT 5th Respondent

ELSA DU TOIT 6th Respondent

KOTIE DU TOIT 7th Respondent

REGISTRAR OF DEEDS, PIETERMARITZBURG 8th Respondent

REGISTRAR OF DEEDS, BLOEMFONTEIN 9th Respondent

MASTER OF THE HIGH COURT, 10th Respondent
BLOEMFONTEIN

CORAM: H.M. MUSI, J

HEARD ON: 6 SEPTEMBER 2007

DELIVERED ON:

20 SEPTEMBER 2007

Summary: Application in terms of section 2(1) of the Immovable Property (Removal or Modification of Restrictions) Act, No. 94 of 1965, for removal of a *fideicommissum* imposed by will – requirements of – valuations of the property at time of death of testator and at time of application necessary in order to assess whether property has appreciated or depreciated in value and whether the circumstances that have arisen have actually materially affected the value of the property.

JUDGMENT

H.M. MUSI, J

- [1] This is an application brought in terms of section 2(1) read with section (3)(1) of the Immovable Property (Removal or Modification of Restrictions) Act, No. 94 of 1965 (the Act) for removal of a restriction imposed by will on immovable property. It is necessary to set out the background to the application and same follows.
- [2] The applicants are, in terms of a will executed by their great grandfather, Cornelis Janse Retief in 1965, the ultimate beneficiaries of a *fideicommissum* registered over certain immovable property comprising farms situated in KwaZulu-

Natal and the Free State. The farms involved are five and are subdivisions of the farms known as Wagenbietjeskop and Zandspruit and are the following:

Avondrust van Union, also known as Sandspruit No. 1134, Wagensbietjeskop No. 1253, Klipkloof B van Landbank No. 1253, Klipkloof van Landbank No. 1253, all of which are situated in KwaZulu-Natal and the farm Zwartberg No. 498 situated in the district of Harrismith in the Free State. It is unnecessary for reasons that will emerge shortly to give details of the registration particulars of the farms. I shall refer to the farms collectively as the property or simply the farms.

- [3] After the death of the applicants' great grandfather the property passed on to his son, the applicants' grandfather, also named Cornelis Janse Retief. When their grandfather passed away in 1978, the property passed on to their father also named Cornelis Janse Retief, but still subject to the *fideicommissum*. The applicants' father became the fiduciary. In 1988 the applicants' father became insolvent and his estate was sequestrated. His fiduciary interest in the farms was sold in a public auction and the first respondent,

who is the mother of the applicants' father, purchased the said interest in the farms and they were transferred to her. The first respondent still holds the property in the place of the fiduciary aforesaid. The purchase was, however, subject to the *fideicommissum* which still remains registered over the property.

- [4] The first respondent is also a trustee of a trust called Elizabeth Anna Retief de Jager Trust and she is cited as the 2nd respondent in her capacity as such. The third respondent is the sister of the applicants' father and is also a trustee of the Elizabeth Anna Retief de Jager Trust. She is cited as 3rd respondent in her capacity as such. She is also cited in her personal capacity as 4th respondent. The 5th, 6th and 7th respondents are the children of the 3rd respondent and have been joined in these proceedings by virtue of their interests as beneficiaries of the Elizabeth Anna Retief de Jager Trust. The 8th and 9th respondents are the Registrars of Deeds for Pietermaritzburg and Bloemfontein, respectively, and no order is sought against them. The 10th respondent is the Master of the High Court, Bloemfontein, and no order is sought against him.

[5] I should mention that the interest of the Elizabeth Anna Retief de Jager Trust in this matter lies therein that the relevant farms have been let out and the trust is the lessor in the relevant lease agreements. In their papers, the applicants query this and begrudge the fact that their father's sister and her children share in the income derived from the lease whereas they get nothing. There is no merit in the complaint. If the first respondent is entitled to let the farms, as she clearly is, she surely can do that through the agency of her trust and she is free to do whatever she wants with the income, including giving it to some of her children and grandchildren.

[6] I now turn to consider the real issues. The applicants seek to have the *fideicommissum* cancelled and the property transferred to them. They are supported by their father. The application is opposed by the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th respondents. It is worth noting at the outset that it is a rule of the common law that the estate of a testator/testatrix should be administered in terms of his/her will and that all restrictions that the testator/testatrix has imposed should be given effect to. The provision of section (2)(1) of the Act

constitutes an inroad into this rule. See **EX PARTE COETZEE** 1949 (2) SA 533 (OPD) at 538 to 539 and the authorities cited there. That means that a party seeking to upset the scheme devised by the testator/testatrix by having recourse to this statutory provision, must bring his/her application squarely within the terms of the statute.

- [7] Section 2(1) of the Act enables a beneficiary with any interest in the immovable property which is subject to a restriction to approach the court for the removal or modification of the restriction on the ground that this will be to his/her advantage. Section 3(1) on the other hand, stipulates what is required to be shown to enable the court to grant the order sought. The requirements that are applicable in this case are those contained in subsection (c) and subsection (d) of section 3(1) and it is apposite to reproduce them:

“(c) that since the taking effect of the will or other instrument imposing any restriction upon the immovable property concerned circumstances materially affecting the value of the property have arisen which in the opinion of the court

were not contemplated or foreseen by the person who made and executed the will or instrument; or

- (d) that it will be in the public interest or in the interests of the persons referred to in subsection (1) of section two, to do so.”

[8] For the proposition that the removal will be in their interests as beneficiaries, the applicants give essentially two reasons. Firstly, they rely on the averment that the farms are not being properly looked after and are depreciating in value. They reason that the only way of halting the deterioration is by transferring the farms to them and say that they will be better placed to properly care for the farms and to put them to proper use. The second reason is that the first respondent is a wealthy person who does not need the income derived from the farms and that she has already made more than enough money out of the property than the R410 000.00 with which she bought their father’s interest in the property. They bemoan the fact that people who have no interest in the property are deriving benefit therefrom whereas they get nothing. They aver that it is in the public interest that this state of affairs be terminated.

[9] In my view, none of the above factors provide sufficient basis for holding that the removal will be in the interests of the applicants. The allegation that the farms are neglected and are depreciating in value is a factor that falls to be considered under the requirement of subsection (c) which will be dealt with in due course. The fact that the 1st respondent is wealthy and does not need the income derived from the farms, is irrelevant and so is the fact that the applicants may be better placed to look after the farms and put them to proper use. If these were relevant considerations very few *fideicommissaries* would await the happening of the event that would entitle them to get ownership of property subject to a *fideicommissum*. Nor can it be in the public interest to prematurely terminate the rights of a fiduciary at the whim of the *fideicommissaries*. It should be remembered that the rights of the fiduciary, the applicants' father, now vest in the first respondent. As such, the first respondent has *dominium* and is entitled to the benefits accruing therefrom for as long as the event that would trigger termination of the *fideicommissum* has not come to pass; that is, the death of the nominated fiduciary.

The applicants have not shown why their interests should take precedence over those of the first respondent.

- [10] The main ground upon which the application was argued is that the property is being neglected and is depreciating in value as a result. The basis of this submission is to be found in paragraphs 24, 25 and 26 of the founding affidavit. Therein the applicants allege that the farms have been let for the past 18 years and that the lessors have never resided thereon with the result that the homestead on Avondrust has for the past 18 years been unoccupied and not maintained. In their replying affidavit the applicants annex photographs of the buildings from which it can be seen that parts of the buildings are in a poor state. The photographs also show loose wires on some of the fences. In a nutshell, the applicants' contention that the property is neglected and is depreciating in value is based primarily on the poor state of the homestead and parts of the fencing. The applicants point out that their father used to reside on one of the farms, cultivated the lands and generally properly looked after the property. This, they say, is what the testator had contemplated and not the current state of affairs.

[11] For the proposition that the value of the property is being materially affected, the applicants annexed to their replying affidavit a sworn valuation of the property compiled by Mr. J.W. Wright on 20 March 1986 showing the total value to be R1 128 000,15. They also annexed an affidavit by Mr. I.J.S. Van der Linde, who says that he visited the property on 1 April 2007 and found that the improvements outlined in paragraph 10 of the 1986 valuation report have been extensively damaged and that such improvements are in a state of disrepair. He propoffers the view that it will cost hundreds of thousands of rands to restore the improvements.

[12] The respondents vehemently dispute that the property is being neglected or that it is deteriorating in value. They say that from 1988 to August 2003 the farms were let as a unit to Mr. P.T. de Jager, popularly known as Flip de Jager, who is an outstanding and reputable farmer and that the latter conducted extensive farming operations of the highest order on the farms and kept them in an excellent condition. From the 1st September 2003 the farms have been hired by the brothers Wessel and Gert Campher both of whom are outstanding farmers. They both use the farms for stock

farming and are said to be diligently looking after them. Some of the farms are used for winter grazing only, which mean that the lands become regularly rehabilitated, so the respondents allege.

[13] The respondents acknowledge that the buildings on the property have indeed been vandalised and are in a state of disrepair. They, however, attribute this partly to the fact that the buildings were already old anyway and partly because the applicants' father, who had been allowed to occupy the homestead after being declared insolvent, had abandoned it.

[14] The difficulty for the applicants is that these are motion proceedings and insofar as there are disputes of fact which cannot be resolved on the papers, the rule in **PLASCON-EVANS PAINTS LTD v VAN RIEBEECK PAINTS (PTY) LTD** 1984 (3) SA 623 (A) applies. Save for the state of the buildings making up the homestead and the fact that the farms are leased, the versions of the parties are diametrically opposed. Therefore the version of the respondents prevails. Even accepting that the buildings have been seriously damaged and would need substantial funds to restore, that

alone does not prove that the value of the property has depreciated or is depreciating, taking into account that such buildings are situated on only one of the five farms. On this basis alone the application stands to fail.

[15] But there are other weighty reasons why the application cannot succeed. In their book **The Law of Succession in South Africa**, 2nd Edition, Corbett, Hofmeyr and Kahn states the following at p. 303 to 304:

“In order to determine whether the value of the property has been materially affected, the court must have before it information as to its value as at the date of the taking effect of the will. This same point of time – and not the date of execution of the will – is critical in deciding whether or not the circumstances relied upon were contemplated or foreseen by the testator, for the legislature clearly intended that the court should have regard to what the testator foresaw or contemplated between the date of execution of the will and the date of death. The circumstances relied upon must not be circumstances brought about by the beneficiaries themselves but must be circumstances arising from events over which they have no control. Moreover, the circumstances must actually affect the

value of the property by causing either a material appreciation or a material depreciation of its value.” (My emphasis.)

The learned authors cite case law authority in this regard.

[16] The first obstacle in the way of the applicants is that valuation of the property as at the time that the testator’s will took effect, being the time of his death, has not been furnished. There is not even an indication of when the applicants’ great grandfather died. At the very least a valuation of the property as at the time of the death of their grandfather in 1978 should have been furnished. Moreover, there is no indication of the purpose of the valuation done by Mr. Wright in 1986 and it does not seem to relate to the administration of the estate of either the applicants’ great grandfather or their grandfather. There is accordingly no information on which it can be assessed whether the value of the property has appreciated or depreciated since the execution of the will took effect. Nor is it possible to assess whether the prevailing circumstances would have been foreseen between the time of execution of the will and the death of the testators. Most importantly, the current value of

the property has not been furnished and it is not known whether the property has appreciated or depreciated since the last valuation of 1986. See **EX PARTE PAIDAS, NO** 1965 (1) SA 52 (WLD) at 57 D - F. Moreover, the fact that a farm is not being cultivated or that the building thereon has been vandalised does not necessarily mean that its overall value has depreciated. So is the fact that some wires on a farm fence are loose. On the other hand, we have evidence that some of the farms are allowed space to rehabilitate. That would obviously enhance their grazing value.

- [17] Now, counsel for both parties were not able to provide me with any reported case with similar facts. The only case I could lay my hands on whose facts are the closest to those of the instant case is **EX PARTE STRANACK** 1974 (2) SA 692 (DNCLD). It is, however, clearly distinguishable. In that case the wife of the testator, who had remained on the farm after the death of her husband (the testator), was murdered on the farm. The property was subject to a *fideicommissum*. The only surviving beneficiary of the testator who assumed the position of fiduciary was not prepared to live on the farm due to the murder aforesaid and had emigrated. The

property was abandoned and left in a derelict state. The homestead thereon was vandalised. On the application of the surviving beneficiary, not being the ultimate *fideicommissary*, it was held that the murder of the testator's wife contributed to the abandonment of the property with the resultant depreciation in its value. It was held that these are circumstances that materially affected the value of the property and they could not have been contemplated by the testator.

[18] It will be noted that the circumstances sketched above had been beyond the control of the beneficiaries and also a valuation of the property obtained during the administration of the estate of the testator had been furnished. *In casu*, the current state of affairs can be attributed to the conduct (insolvency) of a beneficiary, being the applicants' father.

[19] In the premises the application is dismissed. The applicants are to pay the costs of suit jointly and severally, the one paying the other to be absolved.

H.M. MUSI, J

On behalf of the applicants:

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ec/sp